

CASTLE VALLEY SPECIAL SERVICE)	
DISTRICT, NORTH EMERY WATER)	
USERS' ASSOCIATION, and HUNTINGTON-)	
CLEVELAND IRRIGATION COMPANY,)	
Petitioners,)	
vs.)	
)	
UTAH BOARD OF OIL, GAS AND MINING,)	
Respondent.)	
)	
C.W. MINING COMPANY d/b/a)	Case No. 950487
CO-OP MINING COMPANY,)	Cause No. ACT/015/025-93B
Intervenor.)	Docket No. 94-027
)	Priority No. 14

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Article VIII, Section 3 of the Utah Constitution and Utah Code Ann. Sections 40-10-14(6)(a), 40-10-30(3), 63-46b-16(1) and 78-2-2(3)(e)(iv).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

ISSUE ONE: WHETHER THE BOARD OF OIL, GAS AND MINING HAD JURISDICTION TO MAKE FINDINGS OF FACT 42-53 AND CONCLUSIONS OF LAW 6-10.

Standard of Review: The Board's jurisdiction is a question of law which is reviewed for correctness. Harmon v. Ogden City Civil Service Com'n, 890 P.2d 4, 6 (Utah App. 1995).

Preservation of Issue: Subject matter jurisdiction may be raised for the first time on appeal. Thompson v. Jackson, 743 P.2d 1230, 1232 (Utah App. 1987).

ISSUE TWO: WHETHER FINDINGS OF FACT 42-53 AND CONCLUSIONS OF LAW 6-10 ARE RELEVANT TO THE EFFECT ON THE SPRINGS OF MINING THE TANK SEAM.

Standard of Review: As to an agency's selection, interpretation and application of a rule of evidence, the appellate court applies a correction of error standard. When the rule requires the agency to determine admissibility, abuse of discretion is the standard. Utah Dept. Of Transp. v. 6200 South Associates, 872 P.2d 462, 465 (Utah App. 1994).

Preservation of Issue: Water Users did not object to the scope, relevance or admissibility of evidence supporting Findings 42-53 or Conclusions 6-10. [Fact No. 35, *infra*] Issues not raised below are waived on appeal. Gibson v. Board of Review of Indus. Com'n., 707 P.2d 675, 677 (Utah 1985); United States v. Tucker Truck Lines, 344 U.S. 33, 36-37 (1952).

**ISSUE THREE: WHETHER THE EVIDENCE SUPPORTS
THE FINDINGS OF FACT AND CONCLUSIONS OF LAW.**

Standard of Review: This Court upholds an agency's findings if supported by substantial evidence. Utah Ass'n of Counties v. Utah State Tax Com'n, 895 P.2d 819, 821 (Utah 1995).

Preservation of Issue: Water Users did not object to the sufficiency of evidence. [Fact No. 35, *infra*] Issues not raised below are waived on appeal. Gibson, Tucker, *supra*.

**ISSUE FOUR: WHETHER THE BOARD RESOLVED THE
ISSUES RELATING TO 30 U.S.C. SECTION 1309.**

Standard of Review: Whether the Board resolved all of the issues requiring resolution is a question of law to which the Court applies a "correction of error" standard. Questar Pipeline Co. v. Utah State Tax Com'n, 817 P.2d 316, 317-18 (Utah 1991).

Preservation of Issue: Petitioners requested the Board to apply 30 U.S.C. §1309a and thereby preserved the issue for appeal. [Water Users App. A, Tr. 21-26, R. 106-111]

**ISSUE FIVE: WHETHER NOTICE TO PETITIONERS
SATISFIED THE DUE PROCESS CLAUSES OF THE
CONSTITUTIONS OF UTAH AND THE UNITED STATES.**

Standard of Review: Whether the Board's actions were constitutional is a question of law to which the Court applies a "correction of error" standard. Questar Pipeline Co. v. Utah State Tax Com'n, 817 P.2d 316, 317-18 (Utah 1991).

Preservation of Issue: Water Users did not raise any constitutional issue below. [Record generally, Water Users App. O] An appellate court generally will not consider a constitutional issue first raised on appeal. State v. Webb, 790 P.2d 65, 77 (Utah App. 1990).

**ISSUE SIX: WHETHER CO-OP IS ENTITLED TO ITS
ATTORNEY FEES AGAINST WATER USERS ON APPEAL.**

Standard of Review / Preservation of Issue: Governed by U.R.A.P Rule 33.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

CONSTITUTIONAL PROVISIONS

United States Constitution, Fourteenth Amendment, Section 1: ... nor shall any State deprive any person of life, liberty, or property, without due process of law

Utah Constitution, Article I, Section 7: No person shall be deprived of life, liberty or property, without due process of law.

STATUTES

Utah Code Ann. §40-10-6: In addition to those provided in Title 40, Chapter 8, the board and division have the following powers, functions, and duties:

- (1) to make and promulgate in accordance with Title 63, Chapter 46a, the Utah Administrative Rulemaking Act, such rules as are specifically necessary for the regulation of coal mining operations and reclamation operations;
- (4) ... To establish procedures and requirements for the preparation, submission, approval, denial, termination, and modification of applications for coal mining and reclamation permits and for coal exploration permits;
- (9) to do all other things and take such other actions retroactively or otherwise within the purposes of this chapter as may be necessary to enforce its provisions.

Utah Code Ann. §40-10-10(2): The permit application and the reclamation plan submitted as part of a permit application shall be submitted in the manner, form, and content specified by the division in the rules and shall include the following:

- (c) A determination of the probable hydrologic consequences of the mining and reclamation operations, both on and off the mine site with respect to the hydrologic regime, quantity and quality of water in surface and groundwater systems, including the dissolved and suspended solids under seasonal flow conditions, and the collection of sufficient data for the mine site and surrounding areas so that an assessment can be made by the division of the probable cumulative impacts of all anticipated mining in the area upon the hydrology of the area and, particularly, upon water availability; but this determination shall not be required until such time as hydrologic information on the general area prior to mining is made available from an appropriate federal or state agency. The permit shall not be approved until this information is available and is incorporated in the application.

Utah Code Ann. §40-10-11(2): No permit or revision application shall be approved unless the application affirmatively demonstrates and the division finds in writing on the basis of the information set forth in the application or from information otherwise available which will be documented in the approval and made available to the applicant, that:

(c) the assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance specified in Subsection 40-10-10(2)(c) has been made by the division and the proposed operation of same has been designed to prevent material damage to hydrologic balance outside the permit area.

Utah Code Ann. §40-10-14(3):

Upon approval of the application, the permit shall be issued. If the application is disapproved, specific reasons shall be set forth in the notification. Within 30 days after the applicant is notified of the final decision of the division on the permit application, the applicant or any person with an interest which is or may be adversely affected may request a hearing on the reasons for the final determination. The board shall hold a hearing pursuant to the rules of practice and procedure of the board within 30 days of this request and provide notification to all interested parties at the time that the applicant is notified. Within 30 days after the hearing the board shall issue and furnish the applicant, and all persons who participated in the hearing, with the written decision of the board granting or denying the permit in whole or part and stating the reasons.

Utah Code Ann. §40-10-6.7(2)(a)(ii): The conduct of hearings shall be governed by rules adopted by the board which are in accordance with Title 63, Chapter 46b, Administrative Procedures Act.

RULES AND REGULATIONS

R641-106-100. ... The notice will briefly state the purpose of the proceeding and general nature of the order, rule, or regulation to be promulgated or effected. ... In addition to published notice, the Board will give notice by mail to all parties.

R641-108-100.101. The Board shall regulate the course of the hearing to obtain full disclosure of relevant facts and to afford all the parties reasonable opportunity to present their positions.

R641-108-200. The Board shall use as appropriate guides the Utah Rules of Evidence insofar as the same may be applicable and not inconsistent with these rules.

R645-300.133. No permit application or application for a permit change will be approved unless the application affirmatively demonstrates and the Division finds, in writing, on the basis of information set forth in the application or from information otherwise available that is documented in the approval, the following:

133.400. The Division has made an assessment of the probable cumulative impacts of all anticipated coal mining and reclamation operations on the hydrologic balance in the cumulative impact area and has determined that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area;

STATEMENT OF THE CASE

Co-op asks the Court to deny Water Users' Petition for Review, and to affirm the June 13, 1995 Order of the Board of Oil, Gas and Mining, which upheld a Significant Permit Revision Approval from the Division of Oil, Gas and Mining allowing Co-op to mine the Tank Seam.

Co-op has mined coal in Huntington Canyon since the 1940's. In about 1981 Co-op completed mining in a side canyon called Trail Canyon, obtained a mining permit and moved its operation to nearby Bear Canyon, where Co-op began mining a coal seam known as the Blind Canyon Seam. Birch Spring and Big Bear Spring, in which Water Users claim an interest, are nearby but outside Co-op's permit area. Co-op's mining operations have never been shown to adversely affect either the quality or the quantity of water from either spring.

In 1993 Co-op applied for a permit revision to mine the Tank seam within its permit area. Co-op gave evidence mining the Tank seam would not adversely affect Birch or Big Bear Springs because the permit area and therefore the Tank seam was hydrologically isolated from the springs. Water Users objected to Co-op's application. After an informal hearing the Division found the permit area was hydrologically isolated from the springs, determined Co-op's application met all statutory requirements, and on July 21, 1994 issued its Significant Permit Revision Approval.

Water Users appealed to the Board, which held a formal hearing on Water Users' objection. On June 13, 1995, the Board issued its Order. The Board weighed the disputed evidence, found (as the Application showed and the Division had determined) that the permit area and therefore the Tank seam was hydrologically isolated from the springs and that Co-op's Application met all statutory requirements, and upheld the Division's approval of Co-op's application to allow mining the Tank seam. Water Users then filed their Petition for Review.

STATEMENT OF FACTS

1. In 1981 Co-op began mining coal from the Blind Canyon seam in Co-op's Bear Canyon Mine, Huntington Canyon, Utah. [Co-op App. 9, Tr. 168, R. 253]

2. In 1993 Co-op applied for a permit revision to allow mining of the Tank seam within its existing permit area (the Application). As part of the permitting process Co-op filed the Application with the Division, which together with Co-op's permit were made available as public records for review by all interested persons, including Water Users. [Application generally, in Board public records]

3. Co-op included in the Application its Appendix 7-J, a study entitled "Probable Hydrologic Consequences of Mining at Bear Canyon Mine, Emery County, Utah," prepared by EarthFax Engineering. The report was submitted to support Co-op's requested permit revision, not its existing permit. [Fact 38 *infra*.] The purpose of the report was to assess the probable hydrologic consequences of operating and reclaiming the mine. [p.1-1] After summarizing the area's geology and the tritium isotope dating and chemical analysis tests on the waters found in the permit area and Birch and Big Bear Springs [Section 2 generally], the report concluded:

It is unlikely that Bear Canyon Mine will impact Birch and Big Bear Springs for six reasons:

1. Tritium [radioisotope] data indicate that the source of groundwater inflow to the mine is not the same as the source of Big Bear Springs (the Panther tongue of the Star Point Sandstone), but perched aquifers containing relict stored water (Section 2.1.2).
2. Stiff and Piper diagrams indicate that the mine water is of a higher quality than that of the other waters in the area and that Birch Spring and the mine water are not hydraulically connected (Section 2.1.3)
4. The mine and Birch Spring are separated by a complex zone of fractures and faults. The Blind Canyon Fault is a normal fault with 220 feet of vertical displacement and is located near the western limit of mining in the Bear Canyon Mine. This fault could act either as a conduit (if it has open voids)

or as a barrier (if it is filled with gouge) to groundwater flow. In either case, the fault would probably prevent groundwater from moving from the mine to Birch Spring. If the fault did not act as a barrier, it would convey the water moving within it to the surface as a spring. No such spring is present where the Blind Canyon fault intersects the surface, approximately 800 feet east of Birch Spring. [p.2-33, 2-34] . . .

[Co-op App. 1]

4. The Application also included Appendix 7-N, EarthFax Engineering's "Revised Hydrogeologic Evaluation of the Bear Canyon Mine Permit and Proposed Expansion Areas." The purpose of this report was to address the potential for operations at the mine to affect water quality and quantity at Birch and Big Bear Springs. [p.1-1] This report also contained a detailed review of the area's geologic data and tritium and chemical tests and came to the same general conclusions as EarthFax's other report. [Co-op App. 2]

5. The Division published timely notice of the Application. [Water Users App. B]

6. Water Users have or claim the right to use water from Birch and Big Bear Springs, and on that basis claim to be persons with an interest which may be adversely affected by Co-op's mining of the Tank seam. [Water Users App. A] [Co-op App. 9, Tr. 31, 37, 74-76, R. 116, 122, 159-161]

7. On August 12, 1993 Castle Valley Special Service District filed an Objection to the Application and requested a hearing with the Division. Castle Valley alleged:

3(a). Co-op's past mining operations have contaminated Big Bear Canyon Springs and the aquifers feeding the springs.

4. ... Co-op's proposed expansion of its mining operations into the Tank Seam will have an adverse impact upon Big Bear Canyon Springs and the aquifers feeding the springs.

[Water Users App. C]

8. On August 19, 1993 the Division served Water Users with a Notice of Informal Hearing. [Water Users App. D]

9. On September 9, 1993, Water Users participated in the informal hearing. Water Users did not object to the admissibility of Co-op's site-specific hydrologic information, based on relevance or any other grounds. [Record generally]

10. On July 20, 1994 the Division issued a Technical Analysis which summarized the Division's conclusions based on the evidence presented. The Division found:

... Birch Springs and Big Bear Springs are hydrologically isolated from the impacts of mining in the Blackhawk Formation by the presence of two Mancos Tongues in the Star Point Sandstone.

...
The review of water source information, the graphical tracking of precipitation versus flow, the testing of the spring water and mine water quality for tritium dating, analysis of water quality chemical data using Stiff and Piper diagrams, and the known presence of three separate piezometric surfaces based on drilling in the Spring Canyon, Storrs, and Panther Tongues of the Star Point Sandstone leads to a conclusion of no significant material damage to the Hydrologic Balance outside the permit area. [p.21-22]

[Co-op App. 3]

11. On July 21, 1994 the Division issued its Significant Permit Revision Approval, which found "The Division has made an assessment of the probable cumulative impacts of all anticipated coal mining and reclamation operations on the hydrologic balance in the cumulative impact area and has determined that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area." [Water Users App. E]

12. On August 22, 1994 Water Users filed with the Board their "Appeal of Division Determination to Approve Significant Revision to Permit to Allow Mining of Tank Seam by Co-op Mining Company." Water Users requested "that this Board reverse the Division determination approving the Significant Revision," on the ostensible grounds that:

10. ... [T]he mine has intersected dynamic ground water that has been naturally existing in the regional Blackhawk-Star Point aquifer which supplies the Birch and Big Bear Springs.

12. ... [T]he Blackhawk Formation is a part of the regional, large storage aquifer which includes the sandstone members of the Star Point Sandstone.

14. The PHC and Cumulative Hydrologic Impact Assessment ("CHIA") both fail to recognize the adverse impact of Co-op's mining and specifically mine dewatering activity on regional aquifers that feed the Birch and Big Bear Springs

Water Users did not challenge the jurisdiction of the Division to make the findings in its Technical Analysis, and did not challenge the scope, relevance, admissibility or sufficiency of the evidence supporting those findings. [Water Users App. F]

13. On October 6, 1994 the Board served the parties with its Amended Notice of Hearing, which stated, "The purpose of the proceeding will be for the Board to consider the objection of the petitioner to the Division determination approving Co-op Mining Company's Significant Revision to extend its mining operations into the Tank Seam." [Water Users App. H]

14. On September 9, 1994 Co-op served Water Users with a Designation of Exhibits, through which Co-op gave Water Users notice that "all documents previously filed by Co-op with the Division in this matter," and "Co-op's Permit, with all revisions, amendments and supplements thereto," might be used by Co-op as evidence at the hearing. [Co-op App. 4]

15. On October 20, 1994 Co-op served Water Users with a Final Exhibit List, in which Co-op designated specific documents to be introduced as evidence at the hearing, including the two EarthFax Engineering reports in the Application, and the Division's Technical Analysis and the information contained therein. [Co-op App. 1, 2, 3, 5]

16. On October 11, 1994 Water Users served their Exhibit list, giving notice they intended to introduce as evidence maps, charts and diagrams describing the geology and hydrology of the general area containing the permit area. [Co-op App. 6]

17. On October 21, 1994 Water Users served a Supplemental Exhibit List, giving notice they intended to introduce evidence of water quality data for Big Bear Spring. [Co-op App. 7]

18. On October 19, 1994 Water Users served Co-op with "Petitioners response to Co-op's Interrogatories to Petitioners." Water Users identified Bryce Montgomery as their expert witness, and gave notice Mr. Montgomery would testify regarding "Geology, Groundwater Hydrology, the effect of Co-op's Mining operations and mine dewatering, and proposed future mining operations and mine dewatering on Big Bear Spring and Birch Spring." Water Users stated their intention to put on the following evidence:

[T]he activities of Co-op Mining in operating its mine in Big Bear Canyon including its mine dewatering and mine water utilization [is] causing an impact on both Big Bear Spring ... and Birch Spring. ...

This impact by Co-op has caused both decreased flows of the Springs and deterioration of water quality. **These impacts are measurable from the decreased flows of both springs and are due to the hydrologic connection between the aquifer being dewatered in Co-op's mining operations and the aquifers from which Birch Spring and Big Bear Spring issue.** [Emphasis added]

Water Users also said Mr. Montgomery, in forming his opinions, had reviewed "All hydrology documents ... on file regarding Co-op Mine at DOGM." [Co-op App. 8]

19. On October 25, 1994 and November 17, 1994 the Board conducted a formal hearing pursuant to the Amended Notice. Water Users took an active part in the hearing, offering exhibits, putting on direct evidence through fact and expert witnesses, and cross examining fact and expert witnesses called by Co-op and the Division. [Transcript generally]

20. Before the hearing Co-op made a written motion based on collateral estoppel to bar retrial of issues adjudicated during Co-op's last permit renewal. At the hearing Co-op argued:

As to the identity of issues, we are not, by our motion, seeking to exclude facts. **If the petitioner[s] can tie those facts into the real issues at hand, which is whether mining the Tank Seam is going to have an adverse impact on Birch Springs and Big Bear Spring, if there are facts of events that occurred prior to 1991 that can be tied into that issue, then we do not object on the basis of the collateral estoppel, then we do not object on the basis of the collateral estoppel to presenting that issue.** But in the petitioners' appeal and request for agency action, paragraph four, they made some specific allegations that appear to raise the question of whether they want to make an issue of our present mining activities.

And it's that specific issue that was already resolved against petitioners in the last permit renewal go around. And it's that specific issue that is subject to collateral estoppel, not the facts that would support the findings on that issue. Because as I said, **we do not object to them presenting facts on the basis of collateral estoppel if they can tie that fact into the one issue that's really at hand.** [Emphasis added]

Petitioners opposed the motion for being untimely made. The Board denied Co-op's motion on grounds of untimeliness. [Water Users App. I, Tr. 5-8, 10-11, 29, R. 90-93, 95-96, 114]

21. Co-op also made an oral motion to exclude evidence dealing with Co-op's present and prior mining activities on the grounds of relevance. Co-op argued, "Unless petitioners can demonstrate that those activities are relevant to the issue of whether mining the Tank Seam is going to adversely impact those springs, none of that evidence is relevant and should not be admitted."

In response, Petitioners argued:

You have one mine that they wished to begin mining up here, you have something in between, then you have the spring. **Something in between is the existing mine. If we can't explain to you and provide evidence to you as to how that water moves through that mine, and the effect that's having on our springs, then you're missing the major intermediate piece of the puzzle.** It's relevant unless you want to take the middle of the pipe out of the equation. [Emphasis added]

The Board held evidence of Co-op's present and prior mining activities would be admitted:

[T]he Board in its deliberations determined that we would only consider evidence as it relates to the impact of mining of the Tank Seam. However, **if petitioners need to lay foundation by raising issues that relate to current mining activities and as it impacts, they can show that relationship as it impacts, as it might impact the Tank Seam mining, then we will consider those issues as relevant to this case.** [Emphasis added]

[Water Users App. A, Tr.18, 21, 23, 29, R. 103, 106, 108, 114]

22. In their opening arguments, Water Users stated:

But we believe that **even the probable hydrologic consequences filed by the consultant for Co-op** [Co-op App. 1, 2], and the evidence that we're going to show, **will show that the area that the Birch and Big Bear Spring ... that these springs are interconnected with the mining activities,** and that the effect of mining, including mining of the Tank Seam is having, will have a negative impact

both on water quantity and water quality.. Where we disagree and what our points will be as to the conclusions that have been drawn both by the permit, persons seeking the revision of the permit, and by the Division in accepting that, and **we believe that the conclusions are where the mistakes are, not in the facts.**

But I hope you'll be fairly liberal in receiving the evidence because it's tough to tell where one issue starts and another one begins when you have seams of coal that are related to one another by an artificial working, which is the way Co-op is taking that coal out. [Emphasis added]

[Water Users App. A, Tr. 31-32, R. 116-117]

23. Water Users presented their case on the theory that mining the Tank seam would adversely affect the springs because, they contended, the entire vertical region within the permit area -- from the mountain surface, to the Tank seam, to Blind Canyon seam, to Birch and Big Bear Springs -- was hydrologically interconnected, that a single aquifer underlaid the area, that Co-op's mining operation in Blind Canyon seam had intercepted the aquifer and was impacting the springs, and that mining the Tank seam would further impact the aquifer and the springs. [Co-op App. 9, Tr. 103-164, R. 188-249]

24. Bryce Montgomery, Water Users' expert witness, testified he studied Co-op's evidence in forming his opinions:

I've studied all of the documents that they [Co-op] have submitted to the Division of Oil, Gas and Mining in making application for their permitting since I've become involved. And that's included studies their consultants done for them, EarthFax [Co-op App. 1,2]. And I've also studied their submittals here for this hearing, in consideration of their request to be permitted for the Tank Seam coal mining.

[Co-op App. 1, 2] [Co-op App. 9, Tr. 103, R. 188]

25. Water Users put into evidence without objection the information in Co-op's Exhibit B, an excerpt from the Division's Technical Analysis discussing the hydrological consequences of mining the Tank Seam, including the Division's statement as set forth in Fact No. 10, *supra*. [Co-op App.3] [Co-op App. 9, Tr. 153-160, R. 238-245]

26. Co-op made several objections during the hearing [but hardly, as Water Users argue, "countless objections"] to evidence based on relevance and various other grounds. The Board generally allowed Water Users' evidence over Co-op's objections. [See, e.g., Co-op App. 9, Tr. 53-55, 59-60, 68-70, 89, 91, 93-96, 109-111, 138, 151-153, R. 138-140, 144-145, 153-155, 174, 176, 178-181, 194-196, 223, 236-238] [Water Users App. N, Conclusion of Law No. 8]

27. Co-op presented evidence without objection, both on direct and cross-examination, to support its claim that mining the Tank seam would not adversely affect the springs because the permit area, and therefore the Tank seam, was hydrologically isolated from the aquifers feeding the springs. [Co-op App. 9, Tr. 207-267, R. 292-352] [Co-op App. 10, Tr. 280-368, R. 546-632]

28. Co-op's evidence showed mining the Tank Seam would not impact the springs because there is no regional aquifer in the permit area. Co-op's evidence showed that underlying Co-op's permit area are three distinct aquifers, each of which is separated from the others by thick layers of impermeable shale. Birch and Big Bear Springs are fed only from the lowest aquifer. Water Co-op encounters while mining is perched (permanently stored) in the strata at or above Blind Canyon seam. It may well have been there since the mountain was formed countless ages ago. It is not part of any aquifer, and is certainly not a part of the aquifer feeding the springs. [Co-op App. 9, Tr. 208-209, 215, 223, 255-260, R. 293-294, 300, 308, 340-346] [Co-op App. 10, Tr. 284-285, 288-289, 311-313, 319-326, 346, 358-362, 367-368, R. 548-549, 552-553, 575-577, 583-590, 610, 622-626, 631-632]

29. Co-op's evidence showed mining the Tank seam would not impact Birch Spring because a major fault called Blind Canyon Fault separates and isolates Birch Spring from the permit area and therefore the Tank seam. [Co-op App. 9, Tr. 212-213, 265-267, R. 297-298, 350-352] [Co-op App. 10, Tr. 293-294, 365-366, R. 557-558, 629-630]

30. Co-op's evidence also showed mining the Tank seam would not impact Birch Spring because chemical dissimilarities between the Birch Spring water and water found in the mine demonstrate Birch Spring is hydrologically isolated from the geologic strata in Co-op's mining operations. [Co-op App. 10, Tr. 290, 303-304, 326-327, 367, R. 554, 567-568, 590-591, 631]

31. Co-op's evidence showed mining the Tank seam would not impact Big Bear Spring because tritium tests prove the spring water is hydrologically isolated from water found in the permit area. [Co-op App. 10, Tr. 287-288, 368, R. 551-552, 632]

32. Co-op showed Water Users' theory of the permit area hydrology was not credible because they relied on very general information and discounted the site specific data for the permit area. [Co-op App. 9, Tr. 219, 255, R. 304, 340] [Co-op App. 10, Tr. 294-295, R. 559-560]

33. Co-op gave evidence its permit provided for mitigation of any impacts which might occur to springs in the area. [Tr. 191-192] [R. 276-277]

34. At one point during the course of the hearing the Board again explained the scope of the hearing:

Your petition for review has not requested a review of the permit for mining in the Blind Canyon Seam within the permit boundaries. Now, **to the extent that mining the Tank Seam impacts the hydrology of the aquifer, Big Bear and Birch Springs, I guess that's where I seem to be focused** [Emphasis added]

... [W]e want to provide the opportunity for everybody to be heard. But we see the scope, I guess, and we've had discussions that our scope seems to be directed toward a significant revision. The petitioners in this case haven't asked us to look at the permit that was granted in 1991, toward the Blind Canyon Seam. The petitioners have asked us to review the significant revision for the Blind Canyon Seam. The mining of the tank canyon seam impacts what's happening in Blind Canyon seam and the aquifer, and we understand that. My question is how do we get there?

After Water Users gave their explanation of "how do we get there," the Board once again ruled **"it will consider all the evidence** when we recess to consider this case." [Co-op App. 10, Tr. 330, 333, 335, R. 594597, 599]

35. Water Users did not object to the scope, relevance, admissibility or sufficiency of the evidence Co-op offered in support of its model of the area's hydrology. [Record generally]

36. Water Users made no proffer or offer of proof of evidence not submitted at the hearing. The Board did not exclude any evidence of substance Water Users sought to have admitted. [Record generally]

37. Thomas Munson, the Division's hydrologist and expert witness, who made the Division's initial findings, was familiar with both Water Users' and Co-op's theories of the area hydrology, and considered Co-op's information more site specific and more reliable. Mr. Munson testified that Co-op's Application was complete and accurate, that Co-op had complied with all the requirements of the state program, and that the proposed operation was designed to prevent material damage to the hydrologic balance outside the permit area. During Mr. Munson's cross examination, Water Users obtained his testimony the springs are hydrologically disconnected from the permit area. [Co-op App. 10, Tr. 368-379, 410-411, R. 633-643, 674-675]

38. The Division also called Daron Haddock, Mr. Munson's supervisor. He testified Co-op's permit had the baseline data required for approval of its permit and the permit modification. Mr. Munson also testified the EarthFax Engineering reports in the Application were submitted for the permit revision, not the existing permit, and were offered for the approval of the Tank Seam revision. [Co-op App. 10, Tr. 415, 417-418, 421-422, R. 679, 681-682, 685-686]

39. Co-op summarized in closing argument:

[T]he issue is whether allowing Co-op to mine the Tank Seam, will cause material damage to Birch and Big Bear Springs. That's the issue.

The issue is not what happened three years ago in Big Bear, or in the other mining operation. There will be no material damage as the Division has already found, because first, there is no water at the Tank Seam, there is no water above the Tank Seam, there is no water below it.

Second, there is no significant risk of contamination. ...

Third, the uncontroverted evidence establishes that Big Bear Spring is hydrologically isolated from the permit area, and it also establishes that the Birch Spring is hydrologically isolated from the permit area.

[Co-op App. 10, Tr. 426-427, R. 690-691]

40. In their Post Hearing Memoranda, Water Users again argued the Board should adopt their theory the permit area and the springs were hydrologically connected. [Water Users App. K, facts 16, 17] [Water Users App. M p.5]

41. In its written Closing Argument Co-op again argued mining the Tank seam would not impact the Springs, because the two are hydrologically isolated. [Water Users App. J]

42. On June 13, 1995, after months of reviewing all evidence presented by the parties at the hearing, the Board issued a 21-page Order which included extensive Findings of Fact and Conclusions of Law. [Water Users App. N]

43. In its Order the Board again denied Co-op's motion to exclude evidence: **"The Board has chosen to consider all evidence before it concerning alleged damage to the Water Users' springs, and accordingly denies Co-op's motion."** [Water Users' App. N, p. 22]

44. Water Users do not object to the Board's Findings of Fact Nos. 8, 9, 18-21, 25-29 and 40, which consider geologic evidence whether the Tank seam and the springs are hydrologically connected. The Findings of Fact to which Water Users object merely expand on the findings to which Water Users do not object. Findings of Fact Nos. 46-48 consider the tritium isotope and chemical tests as they relate to the presence or lack of a hydrologic connection between the Tank seam and the springs. Findings 52 and 53 summarize the other findings. The conclusions of law to which Water Users object follow naturally from the Findings of Fact. [Water Users App. N]

45. Water Users requested the Board to modify its order. When the Board denied the request, Water Users brought this Petition for Review. [Water Users App. O, R, S]

SUMMARY OF ARGUMENTS

The Board's jurisdiction is determined by Utah Code Ann. §§ 40-10-1 *et seq.* The Board has power to resolve issues respecting the hydrological impact of mining operations, and to make findings to support its decisions. The Board found mining the Tank seam will not adversely affect Birch and Big Bear Springs, because Co-op's permit area and therefore the Tank seam is hydrologically isolated from the springs. That decision is within the Board's statutory jurisdiction.

The Board's findings and conclusions are within the scope of the issues raised by Co-op's Application, Water Users' appeal and the Board's Notice of Hearing. Evidence the permit area is hydrologically isolated from the springs is relevant because it makes more probable that mining the Tank seam will not adversely affect the quantity or quality of water from the springs.

Water Users have the burden to marshal all evidence to support the Board's findings and show it insufficient to support the findings. Water Users have not even tried to meet that burden. The record contains substantial evidence to support the Board's findings and conclusions.

The Board found Co-op's permit area, and therefore the Tank seam, is hydrologically isolated from Birch and Big Bear Springs. The Board also found Co-op had met all requirements required by federal and state statutes and regulations. Those findings are sufficient to support the Board's decision to allow Co-op to mine the Tank seam. The findings which form the basis for the Board's decision make it unnecessary to further address 30 U.S.C. §1309a.

Water Users had due process because they had not merely notice but actual knowledge of all issues, and had full opportunity to present all evidence at their disposal relating to those issues.

Co-op should be awarded its attorney fees against Water Users because the Petition is without a reasonable legal or factual basis.

ARGUMENT

Water Users's entire Petition rests on a faulty premise, that the Board's Findings of Fact Nos. 42-53 and Conclusions of Law Nos. 6-10 have nothing to do with the hydrologic impact of mining the Tank seam. In truth, the Board's Order is right on target; so much so that the Board's ruling -- mining the Tank seam does not affect the springs, because the permit area and therefore the Tank seam is hydrologically isolated from the springs -- shoots Water Users out of the water.

Water Users grossly mischaracterize the proceedings below. From the moment Co-op first applied for its permit revision, Co-op proceeded on the theory the permit revision would not affect the springs because the springs were hydrologically isolated from the permit area and were therefore isolated from the Tank seam. Water Users proceeded on the opposing theory that a hydrologic connection allowed the springs to be impacted by mining the Tank seam. The Board hearing centered on whether there was a hydrologic connection between the springs and the Tank seam. Co-op's evidence was offered without objection to establish the lack of a hydrologic connection. The Board simply found Co-op's evidence more believable than Water Users'. That the same facts may also support a conclusion as to Co-op's mining of other coal seams does not affect the Board's power to rely on those facts to decide the Tank seam issue.¹

1 Water Users improperly seek to make an issue of the effect of the Board's Order on other proceedings before the Division. [Joint Brief of Petitioners p. 9, 14-15, 17, 25] As Water Users correctly point out elsewhere in their brief, and as the Board correctly ruled in its Conclusion of Law No. 4, Co-op's rights under its existing permit are not at issue in this proceeding. In addition, Water Users' Appendix T and other documents relating to Co-op's 1995 permit renewal are not part of the record on appeal. See Blodgett v. Zions First Nat. Bank, 752 P.2d 901, 903 n.1 (Utah App. 1988) ("We note, however, merely attaching a document to an appellate brief does not make the document part of the record. ... [F]acts asserted in briefs, even if true, but not contained in the official record will not be considered on appeal")

Water Users place unwarranted reliance on the statement in Conclusion of Law No. 6, "The Board therefore does not believe that it is relevant to consider the hydrologic impacts of existing mining in the permit area." The Board was merely restating what it had said during the course of the hearing, that the existing permit was not before the Board. [Facts 21, 34 *supra*.]

Water Users ask the Court to ignore black letter rules of construction, to take the Board's statement out of context, and to distort beyond reasonable interpretation what is at most an imprecise choice of words. Any unclarity in the Board's choice of words is readily resolved according to the rules applicable to the construction of contracts and other written instruments. Moon Lake Water Users Ass'n v. Hanson, 535 P.2d 1262, 1264 (Utah 1975). This Court stated the applicable rule in Utah Valley Bank v. Tanner, 636 P.2d 1060, 1061-62 (Utah 1981):

Each contract provision is to be considered in relation to all of the others, with a view toward giving effect to all and ignoring none.

Moreover, this Court construes judgments to make them effective where possible:

Where construction is called for it is the duty of the court to interpret an ambiguity which will make the judgment more reasonable, effective, conclusive, and one which brings the judgment into harmony with the facts and the law.

Moon Lake, *supra*.

The source of Co-op's evidence does not affect its relevance. While Co-op's existing permit was not before the Board, evidence Co-op obtained while working under its existing permit is directly relevant to prove no hydrologic connection exists between the Tank seam and the springs, which was the central issue tried to the Board. Evidence irrelevant for one purpose cannot be excluded if it is admissible for another purpose. Hill v. Hartog, 658 P.2d 1206, 1209 (Utah 1983). The Board ruled before Water Users began their case that the information was relevant to the issue at hand [Fact 21, *supra*], confirmed its relevance during the hearing [Fact 34, *supra*], and ruled yet again in its Order to admit the evidence. [Conclusion of Law No. 8]

This Court should construe the Order as a whole to make it effective, and affirm the Board's decision that while Co-op's existing permit was not at issue, the Board could properly consider all evidence relating to the Tank seam. The evidence supporting the Board's Order was offered to show there is no hydrologic connection between the Tank seam and the springs. The evidence is relevant for that purpose, was properly admitted for that purpose, and proved the lack of a hydrologic connection.

The issues reduce to one -- did the Board correctly find the Tank seam is hydrologically isolated from the springs? The Board's decision should be affirmed, because the Board had jurisdiction to address the issue, the issue was within the scope of the proceedings and is relevant to the approval of Co-op's permit revision, the Board's findings on that issue are supported by substantial evidence, and Water Users had notice and an opportunity to be heard on the issue.

I. THE BOARD HAD JURISDICTION.

In 1977 Congress passed the Surface Mining Control and Reclamation Act (SMCRA), which encompassed a broad regulatory scheme for coal mine operations, and empowered states to enact their own laws within its framework. In response, in 1979 Utah enacted the Utah Coal Mining and Reclamation Act, Utah Code Ann. §40-10-1 *et seq.* (The Act). The Board has broad authority under the Act to resolve issues regarding the hydrological impacts of coal mining activity.

The Legislature has empowered the Board:

- (1) to make and promulgate in accordance with Title 63, Chapter 46a, the Utah Administrative Rulemaking Act, such rules as are specifically necessary for the regulation of coal mining operations and reclamation operations;
- (4) ... To establish procedures and requirements for the preparation, submission, approval, denial, termination, and modification of applications for coal mining and reclamation permits and for coal exploration permits;
- (9) to do all other things and take such other actions retroactively or otherwise within the purposes of this chapter as may be necessary to enforce its provisions.

Utah Code Ann. §40-10-6. The Board is empowered to enforce Utah Code Ann. §40-10-10(2), which requires a permit applicant to include in its application:

(c) A determination of the probable hydrologic consequences of the mining and reclamation operations, both on and off the mine site with respect to the hydrologic regime, quantity and quality of water in surface and groundwater systems, including the dissolved and suspended solids under seasonal flow conditions, and the collection of sufficient data for the mine site and surrounding areas so that an assessment can be made by the division of the probable cumulative impacts of all anticipated mining in the area upon the hydrology of the area

It was to meet this requirement that Co-op included in its Application the two EarthFax Engineering reports [Co-op App. 1, 2] The information in those reports, expounded upon by expert testimony during the Board hearing, forms the factual basis for the Board's decision. The Board certainly had jurisdiction to consider the hydrological evidence presented without objection, and to make findings regarding the area hydrology to support its Order affirming the permit revision based on that evidence.

The Board is also empowered to enforce Utah Code Ann. §40-10-11(2), which requires an applicant to demonstrate and the Division to find:

(c) the assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance specified in Subsection 40-10-10(2)(c) has been made by the division and the proposed operation of same has been designed to prevent material damage to hydrologic balance outside the permit area.

The Board properly received evidence that the Division, to meet its statutory obligation under section 40-10-11(2), reviewed the Application, analyzed its contents, considered evidence from Water Users, prepared its Technical Analysis which found no hydrologic connection between the Tank seam and the springs, and made the specific findings required by law to approve Co-op's permit revision [Co-op App. 3; Water Users App. E].

Castle Valley's reliance on Blaine Hudson Printing v. Utah State Tax Com'n, 870 P.2d 291 (Utah App. 1994), Parkdale Care Center v. Frandsen, 837 P.2d 989 (Utah App. 1992), Morris v.

Public Service Com'n, 321 P.2d 644 (Utah 1958), and Kennecott Corp. v. Industrial Com'n, 740 P.2d 305 (Utah App. 1987) is misplaced. Blaine and Parkdale involved the agencies' lack of jurisdiction over specific areas of law. Morris and Kennecott dealt with agency orders purporting to resolve ultimate issues not before the agencies. None of those cases contain even dicta on the extent of an agency's power to make findings when ruling on a claim properly before the agency.

The Board had not only the power but the obligation to decide if the Application satisfied section 40-10-10(2), and if the Division complied with section 40-10-11(2). The Board had jurisdiction to assess the probable cumulative impact from mining the Tank seam on the hydrologic balance, and to determine Co-op's operation in the Tank seam would not cause material damage to Birch and Big Bear Springs.² That is just what the Board's Findings of Fact Nos. 42-53 and Conclusions of Law Nos. 6-10 do. The Board had jurisdiction to make its Order.

II. THE BOARD'S FINDINGS AND CONCLUSIONS ARE RELEVANT TO THE SCOPE OF THE PROCEEDINGS.

A. WATER USERS WAIVED THE ISSUE BY FAILING TO RAISE IT BELOW.

Issues not raised before an agency are waived on appeal. Gibson v. Board of Review of Indus. Com'n., 707 P.2d 675, 677 (Utah 1985); Brinkerhoff v. Schwendiman, 790 P.2d 597, 589 (Utah App. 1990) and cases cited therein. An objection preserving an issue must be clear on the record, Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832, 837, 839 (Utah 1984), and must be made or joined in by the party raising the issue on appeal. Cook Associates, Inc. v. Warnick, 664 P.2d 1161, 1164-65 (Utah 1983). In United States v. Tucker Truck Lines, 344 U.S. 33 (1952), the U.S. Supreme Court explained the reason for the rule:

² The scope of proceedings as determined by Co-op's Application, Water Users' Appeal to the Board and the Board's Notice is really an issue of relevance, not subject matter jurisdiction. Co-op addresses that issue in point II *infra*.

We have recognized in more than a few decision, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. ... Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

Id. at 36-37. Utah courts apply the same reasoning. Brinkerhoff, *supra*; point V(A) *infra*. Raising an issue for the first time in a post-trial motion (for example, Water Users' App. O) does not preserve an issue for appeal. Barson, *supra*; Estate of Covington v. Josephson, 888 P.2d 675, 678 (Utah App. 1994).

Water Users did not object below to the scope or relevance of the Board's Findings of Fact and Conclusions of Law, or to the admissibility of the evidence supporting the findings and conclusions [Fact No. 35, *supra*]. Water Users' failure to raise the issue before the Board deprived the Board of the opportunity to rule on the issue, and to correct itself if in error. By failing to object Water Users failed to preserve the issue, and waived it for purposes of appeal.

B. THE BOARD'S FINDINGS AND CONCLUSIONS ARE RELEVANT.

The Board had the responsibility to resolve whether Co-op's Application satisfied Utah Code Ann. sections 40-10-10(2) and 40-10-11(2) as to any effect mining the Tank seam would have on Birch and Big Bear Springs. The Board is also required by law to make adequate findings of fact and conclusions of law to support its decision that Co-op's permit revision was designed to prevent material damage to the hydrologic balance of the springs.

The Board's findings of fact and conclusions of law do just what the Board was required to do, and no more. This Court defers to the Board's expertise in resolving factual issues, and

applying the facts to the law under U.C.A. §§ 40-10-10 and -11. In Salt Lake City Corp. v. Utah Dept. of Employment Security, 657 P.2d 1312, 1316 (Utah 1982), this Court stated:

[W]here the language of a statute indicates a legislative intention to commit broad discretion to an agency to effectuate the purposes of the legislative scheme, we will not substitute our judgment for that of the agency as long as the commission's interpretation has "warrant in the record" and a reasonable basis in the law." [Citations omitted] Furthermore, where agency decisions deal with technical questions which call for the exercise of expertise, born either of a technical background and training or long experience in dealing with numerous, similar problems, we also accord deference to an agency's interpretation because of the necessity to recognize discretion commensurate with the nature of the issue.

The legislature has intentionally given to the Board broad discretion to enforce all provisions of the Act. The legislature intended the Board to deal with technical questions arising under the Act, and exercise its expertise to resolve whether a permit satisfies the hydrology requirements of the Act. The Board's findings and conclusions are within the scope of its statutory discretion to determine, under U.C.A. § 40-10-10 and -11, whether Co-op's proposed operation of the Tank seam has been designed to prevent material damage to the hydrologic balance outside the permit area. This Court defers to the Board's expertise in making such decisions.

Whether the permit area and therefore the Tank seam is hydrologically connected to the springs, or instead is isolated from the springs, has always been at issue. Co-op made the claim that the springs are hydrologically isolated from the permit area, and therefore the Tank seam, as a central point of its Application. [Facts 2-4] From their first appearance before the Division Water Users joined that very issue. [Fact 7] The point was addressed by the parties before the Division, and by the Division in approving the Application. [Facts 9-11]

Water Users asked the Board to hear their appeal on the theory they would be adversely affected by mining the Tank seam because the permit area connects with and removes water from the aquifers feeding the springs. Water Users specifically contended in their appeal:

10. ... [T]he mine has intersected dynamic ground water that has been naturally existing in the regional Blackhawk-Star Point aquifer which supplies the Birch and Big Bear Springs.

12. ... [T]he Blackhawk Formation is a part of the regional, large storage aquifer which includes the sandstone members of the Star Point Sandstone.

14. The PHC and Cumulative Hydrologic Impact Assessment ("CHIA") both fail to recognize the adverse impact of Co-op's mining and specifically mine dewatering activity on regional aquifers that feed the Birch and Big Bear Springs

[Fact 12] The Board agreed to try those very issues when it stated in its Notice of Hearing, "The purpose of the proceeding will be for the Board to consider the objection of the petitioner to the Division determination approving Co-op Mining Company's Significant Revision to extend its mining operations into the Tank Seam." [Fact 13]

Before the hearing Co-op and Water Users gave notice to each other that the connection *vel non* between the permit area and the springs was an issue. [Facts 14-18] Water Users tried their case to the Board on the theory the permit area and therefore the Tank seam was hydrologically connected to the springs; none of Water Users' evidence on that theory was excluded. [Facts 21-26, 36] Co-op proceeded before the Board on the countervailing theory the permit area and therefore the Tank seam was hydrologically isolated from the springs. Water Users made no objection to any evidence Co-op presented on the issue. [Facts 27-33, 35] Until they lost on the merits, Water Users consistently proceeded on the basis the Board's authority was broad and expansive and that the issue was within the scope of the proceedings. It was even in response to Water Users' steadfast insistence that the Board agreed to consider the broad range of evidence presented. [Water Users App. C, F, K, N; Transcript generally]

Water Users asked the Board "that this Board reverse the Division determination approving the Significant Revision," and that "they be given an opportunity for a hearing where they can each present oral argument and demonstrate the material damage which will result to their water sources if the Division's approval of the Significant Revision is not reversed or altered." [Joint Brief of

Petitioners, p. 20] Co-op was entitled to a similar opportunity to put on its evidence that no material damage would result from the revision. The Board's Findings of Fact Nos. 42-53 -- that there are three hydrologically distinct aquifers separated by impermeable shale layers; that the springs issue only from the lowest aquifer; that tritium dating confirms Big Bear Spring is hydrologically distinct from the permit area and therefore the Tank seam; that chemical analysis and the presence of Blind Canyon Fault confirm the same for Birch Spring; that declines in spring flow result from a local drought rather than mining activity; that an unrelated spring cannot be used as a "control" -- are all based on evidence Co-op presented without objection to support its claim and counter Water Users' theory. Based on the facts and issues tried to the Board with Water Users' consent, and in reliance on the evidence given not only without objection but upon Water Users' urging,³ the Board ruled mining the Tank seam would not affect the springs because the permit area, and therefore the Tank seam, was hydrologically isolated from the springs.

It is disingenuous for Water Users now to argue the Board's findings and conclusions supporting that ruling are somehow beyond the scope of the proceedings and irrelevant to the central issue before the Board. Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. Utah R. Evid. 401. The Board's findings, and the evidence supporting those findings, tend to make more probable that mining the Tank seam would not adversely affect the springs. The findings are relevant, and evidence to support those findings is admissible.

3 Water Users are not entitled to relief even if the Board erred in considering the evidence, which it did not. A party who leads an adjudicatory body into error cannot complain of that error to obtain reversal. Merriam v. Merriam, 799 P.2d 1172, 1175-76 (Utah App. 1990), citing Helman v. Paterson, 241 P.2d 910, 193 (Utah 1952); Green v. Green, 579 P.2d 1235, 1237 (Mont. 1978) (no reversible error where appellant acquiesced, participated in, or made no objection to trial court's ruling or procedure). If the Board erred, Water Users led it into the error.

Many of the findings to which Water Users object merely summarize the evidence. In Adams v. Board of Review of Indus. Com'n, 821 P.2d 1 (Utah App. 1991), the Court noted:

While the purported "Findings of Fact" written by the A.L.J. contain an informative summary of the evidence presented, such a rehearsal of contradictory evidence does not constitute findings of fact. In order for a finding to truly constitute a 'finding of fact,' it must indicate what the A.L.J. determines in fact occurred, not merely what the contradictory evidence indicates might have occurred.

Id. at 6. Any challenge to such a "finding" is really a challenge to the evidence described in the finding. Water Users did not object to the evidence and so waived that issue on appeal. See point III(A), *infra*. The findings and evidence Water Users protest may be summarized as follows:

42. The Board gave it's rationale for making the findings that follow.
43. Water Users theorized a single regional aquifer both feeds the springs and intersects Co-op's mine workings.
44. Co-op's expert testified three separate aquifers, separated by impermeable shale deposits, underlay the permit area, and the springs were fed from the lowest aquifer, so mining in the permit area would not affect spring flow.
45. The Board found Co-op's evidence more credible.
46. Tritium testing can determine whether water has been underground since before above-ground nuclear testing was conducted.
47. Tritium testing showed water in Co-op's mine predating the nuclear age, while water from Big Bear Spring was "new" water, confirming the permit area is hydrologically isolated from Big Bear Spring.
48. Chemical analysis showed dissimilarities between the mine water and Birch Spring water.
49. Any decline in water flow at the springs was from decreased precipitation, not from Co-op's mining activities.
50. Neither parties' evidence on a 1991 anomaly in Big Bear Spring is dispositive.
51. Another spring across Huntington Canyon is not useful as a control.
52. Summarizes Findings 46-48, as well as Finding 29 to which Water Users do not object.
53. Mining Blind Canyon seam will not damage the springs (similar to finding 41, to which Water Users do not object).

The Board's findings of fact, and the evidence supporting them, are relevant to the issue before the Board, whether Co-op could mine the Tank seam. The Tank seam is within the permit area some 220 vertical feet above Blind Canyon seam, which in turn is hundreds of feet above the

aquifer feeding the springs. To affect the springs, any water loss or contamination from the Tank seam would have to cross all the geologic strata between the Tank seam and the aquifers, including the Blind Canyon seam. This is the same point Water Users made to the Board, and the same rationale the Board followed to allow evidence on the issue. [Fact 21, *supra*] It follows not just as a reasonable inference, but as an inescapable conclusion, that if mining the Blind Canyon seam will not adversely affect the springs, neither will mining the Tank seam. The Board's findings are more than marginally relevant; they make the point clearly and succinctly. Water Users' real but unstated objection is that the evidence was so strongly against them. That is not a reasonable basis in fact or law for an appeal.

The Board is not merely permitted, it is required by law to make detailed findings and conclusions to support its decision. As stated in Adams v. Board of Review of Indus. Com'n, 821 P.2d 1, 4-5 (Utah App. 1991):

An administrative agency must make findings of fact and conclusions of law that are adequate detailed so as to permit meaningful appellate review.

In order for us to meaningfully review the findings of the commission, the findings must be "sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." [T]he failure of an agency to make adequate findings of fact in material issues renders its findings "arbitrary and capricious" unless the evidence is "clear, controverted and capable of only one conclusion." [Citations omitted]

The Utah Supreme Court has clearly described the detail required in administrative findings in order for findings to be deemed adequate.

[An administrative agency] cannot discharge its statutory responsibilities without making findings of fact on all necessary ultimate issues under the governing statutory standards. It is also essential that [an administrative agency] make subsidiary findings in sufficient detail that the critical subordinate factual issues are highlighted and resolved in such a fashion as to demonstrate that there is a logical and legal basis for the ultimate conclusions. The importance of complete, accurate, and consistent findings of fact is essential to a proper determination by an administrative agency. To that end, findings should be sufficiently detailed to disclose the steps

by which the ultimate factual conclusions, or conclusions of mixed fact and law, are reached. *Without such findings, this Court cannot perform its duty of reviewing [an administrative agency's] order in accordance with established legal principles and of protecting the parties and the public from arbitrary and capricious administrative action.* [quoting Milne Truck Lines, Inc. v. Public Serv. Com'n, 720 P.2d 1373, 1378 (Utah 1986)] [Italics in original]

While a failure to make sufficient findings is reversible error, Co-op knows of no case where an agency was reversed for making the findings too detailed. This Court should not put an agency in the untenable position of risking reversal by second-guessing itself and omitting essential findings, as occurred in Hidden Valley Coal Co. v. Utah Bd. of Oil, Gas & Min., 866 P.2d 564, 568-69 (Utah App. 1993). The findings to which Water Users object are “findings of fact on necessary ultimate issues,” or at least “subsidiary findings in sufficient detail that the critical subordinate factual issues are highlighted and resolved in such a fashion as to demonstrate that there is a logical and legal basis for the ultimate conclusions.”

Even Water Users admit the evidence is relevant “to place the proposed Tank Seam in a context with those operations and to avoid the segmented view of the operations Petitioners believed Co-op and the DOGM had taken in prior proceedings.” [Water Users App. O, Request for Rehearing p.2; Joint Brief of Petitioners, p. 28] Water Users also admit the evidence is relevant if it “ties to impacts of the Tank seam.” [Joint Brief of Petitioners, p. 23] The facts and conclusions to which Water Users object do just that -- they place the Tank seam in context with Co-op's other operations, and avoid an improperly segmented view of those operations. The evidence ties to impacts of mining the Tank seam, to prove there are no impacts. That the findings are against Water Users does not make them beyond the scope of proceedings below. It does not make the findings irrelevant. It does not justify overturning the findings. This Court should find the Board's findings are relevant, and affirm the Board's Order.

III. THE BOARD'S FINDINGS AND CONCLUSIONS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. WATER USERS WAIVED THE ISSUE BY FAILING TO RAISE IT BELOW.

Issues not raised before an agency are waived on appeal. Point II(A), *supra*. Water Users did not object below as to the sufficiency of evidence to support Findings of Fact 42-53 or Conclusions of Law 6-10 [Fact 35], and thereby waived the issue.

B. WATER USERS FAILED TO MARSHAL THE EVIDENCE.

Rule 11 of the Utah Rules of Appellate Procedure requires Water Users to provide all evidence pertinent to the issues on appeal. King v. Industrial Com'n, 850 P.2d 1281, 1285 (Utah App. 1993). When challenging the sufficiency of the evidence [Joint Brief of Petitioners, p. 25-29], Water Users have the burden to marshal all record evidence in support of the Board's findings, and to demonstrate that evidence is not enough on which to base the findings. First Nat'l Bank of Boston v. Salt Lake County Bd of Equalization, 799 P.2d 1163, 1165 (Utah 1990) ("the party challenging the facts ... must marshal all of the evidence supporting the findings and show that despite the supporting facts, the ... findings are not supported by substantial evidence.).

Water Users have not even acknowledged their burden to marshal the evidence, much less made any effort to do so. The transcript indices [Co-op App. 9, 10] show hearing testimony containing the words "chemical," "connection," "isolated," "isotope," and "tritium." Water Users not only failed to cite to the evidence, they apparently took pains to systematically exclude all reference to any evidence supporting the Board's findings and conclusions.

Having failed in their burden to marshal the evidence, Water Users have offered this Court "no basis on which to evaluate the findings and conclusions," *Id.*, and so have waived any right to contest the sufficiency of the evidence to support the Board's Findings. This Court should affirm Findings of Fact Nos. 42-53 as supported by substantial evidence.

C. THE FINDINGS AND CONCLUSIONS ARE SUPPORTED BY THE EVIDENCE.

Utah Code Ann. §§ 40-10-30(3) and 63-46b-16(4)(g) allow relief if the agency action is based on a finding of fact not supported by substantial evidence when viewed in light of the whole record. Substantial evidence is relevant evidence adequate to convince a reasonable mind to support a conclusion. It is not the appellate court's prerogative to reweigh the evidence. When reasonably conflicting views arise, it is the agency's province to draw inferences and resolve those conflicts. Utah Ass'n of Counties v. Utah State Tax Com'n, 895 P.2d 819, 821 (Utah 1995). This is particularly true where, as here, the legislature has given the Board broad power to exercise its expertise in the area at issue. Salt Lake City Corp., *supra*.

Had Water Users marshaled the evidence, they would have cited substantial evidence supporting the Board's findings and conclusions, and proved there is no reasonable basis in fact for their Petition. *See* Facts Nos. 25, 27-32, 37, 38 *supra*; Co-op App. 1, 2, 3. The Board did not exclude any evidence relating to the findings Water Users challenge. There was never even a single objection to the evidence, much less a decision to sustain an objection. [Fact 35, *supra*] The Board considered all the evidence offered by both parties [Conclusion of Law No. 8].

The Board weighed the evidence, and exercised its discretion to find Co-op's evidence more convincing than Water Users'. [Water Users App. N, Finding of Fact No. 45] It is the prerogative of the Board to weigh the testimony of the expert witnesses. Questar Pipeline v. Utah State Tax Com'n, 850 P.2d 1175, 1178 (Utah 1992). The Board's Order "deals with technical questions which call for the exercise of expertise" in determining whether the Application meets the statutory requirements for hydrology; this Court accords the Board deference in such matters. Salt Lake City Corp. v. Department of Employment Security, 657 P.2d 1312, 1316 (Utah 1982). This Court defers to the Board's discretion in weighing the evidence. Utah Ass'n of Counties, *supra*. The

record contains evidence adequate to convince a reasonable mind to support the Board's conclusions. This Court should affirm the Board's Order including Findings of Fact Nos. 42-53, as supported by substantial evidence when viewed in light of the whole record before the Board.

IV. THE BOARD DECIDED ALL ISSUES REQUIRING RESOLUTION.

Water Users' contention that 30 U.S.C. §1309a obligates the Board to require that Co-op identify and secure in advance a source to replace water at Birch and Big Bear Springs is without any reasonable basis in law. Co-op has no statutory obligation to identify and secure in advance a prospective water source for a nonexistent contingency. 30 U.S.C. §1309a provides:

- (a) Underground coal mining operations conducted after October 24, 1992, shall comply with each of the following requirements:
 - (2) Promptly replace any drinking, domestic, or residential water supply from a well or spring in existence prior to the application for a surface coal mining and reclamation permit, which has been affected by contamination, diminution, or interruption resulting from underground coal mining operations.

On its face the statute does not require a mine operator to identify in advance the source from which it will obtain replacement water should a hypothetical need arise at some undetermined future date.

Water Users do not challenge the Board's Findings 1-41 or Conclusions 1-5. Finding No. 41 states, "Based upon this evidence, the Board finds that mining in the Tank seam will not cause material damage to the hydrologic balance, either through reduction in supply or contamination. Co-op has satisfied its burden of proof on this issue." Conclusion No. 5 states, "... Co-op has met its burden of demonstrating that material damage to the hydrologic balance will not occur from mining in the Tank Seam." Even so, Water Users still persist in arguing to this Court that mining the Tank seam will "consume groundwater which would have eventually made its way to Petitioners' water sources." [Joint Brief of Petitioners p.31] That argument is not only lacking any

support in fact or law, it demonstrably false on its face. The unchallenged findings and conclusions directly contradict Water Users' argument and prove mining the Tank seam will not affect the springs. In the language of 30 U.S.C. §1309a, the unchallenged findings and conclusions prove the springs will not be affected by contamination, diminution, or interruption resulting from mining the Tank seam, so Co-op has no obligation to identify a source of replacement water.

The Board correctly decided the applicability of 30 U.S.C. §1309a to the facts of this case, when it stated in its Conclusion of Law No. 9, "The Water Users have failed to prove to the Board as a factual matter that either the quantity or quality of their water has been adversely impacted by mining at the Bear Canyon mine, so the statute may not be applied to Co-op here."

Further, the Board's unchallenged Conclusion of Law No. 3 states, "The Board concludes that the permit application was in fact complete, and that the requirements of the Utah Coal Mining and Reclamation Act and associated regulations have been complied with." One of the regulations the Board concluded Co-op complied with is R645-301-731, which provides in part:

The permit application will include a plan, with maps and descriptions, indicating how the relevant requirements of R645-301-730, R645-301-740, R645-301-750 and R645-301-760 will be met. The plan will be specific to local hydrologic conditions. It will contain the steps to be taken during coal mining and reclamation operations ... to meet applicable federal and Utah water quality laws and regulations. For purposes of SURFACE COAL MINING AND RECLAMATION ACTIVITIES the plan will include measures to be taken to protect or replace water rights and restore approximate recharge capacity.

This Rule encompasses the requirements of 30 U.S.C. §1309a. The Board found, based on evidence, that Co-op's Applications meets those requirements. [Facts Nos. 33, 37, *supra*] Water Users did not marshal the evidence to show it is legally insufficient, and so waived any right to challenge the Board's conclusion regarding the legal sufficiency of the Application. [Point III(B), *supra*] The Board, having made all findings required by law to support its decision, is not required to further consider 30 U.S.C. §1309a.

V. THE BOARD SATISFIED DUE PROCESS.

A. WATER USERS WAIVED THE ISSUE BY FAILING TO RAISE IT BELOW.

Utah Code Ann. §40-10-30(3) and Utah Code Ann. §63-46b-16(4)(a) allow relief if “the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied.” The only constitutional claim Water Users make is that they were denied due process on the ostensible ground they were not given notice and an opportunity to be heard on the issues underlying Findings of Fact Nos. 42-53 and Conclusions of Law Nos. 6-10.

An appellate court generally will not consider even a constitutional issue raised for the first time on appeal. Point II(a), *supra*; Barney v. Utah Dept. of Commerce, 885 P.2d 809 (Utah App. 1994) (due process claim based on inadequate notice denied where not first raised before an administrative agency). Users did not raise its due process issue before the Board [Record generally], and thereby waived the issue on appeal.

B. WATER USERS HAD NOTICE AND AN OPPORTUNITY TO BE HEARD.

Water Users’ due process claim lacks even a colorable basis in fact. There was no due process violation. The appeal on its face raised the issue whether the Tank seam and the springs were hydrologically connected. Water Users asked to present their claim the springs would be affected by mining the Tank seam because the permit area connects with the aquifer feeding the springs. [Fact 12] The Board said it would try that very issue. [Fact 13] Water Users had ample notice and an opportunity to be heard. They knew of Co-op’s evidence before the hearing, and actively joined in presenting the evidence behind the findings and conclusions now objected to. Facts 2-44; Point II(B) *supra*. It was even Water Users who first put Co-op’s hydrology reports and the Division’s Technical Analysis in evidence, and who, through their cross-examination of Co-op and Division witnesses, largely developed the very evidence they now find unpalatable.

At this late date Water Users now argue that had they known in advance how the Board would rule based on the evidence before it, Water User's evidence "would have been substantially different and far more complete," and their presentation "would have been entirely different." [Joint Brief of Petitioners p. 16, 17] Nothing in the record remotely suggests those claims are true, or that Water Users were prejudiced in any way by an inability fully to present their case. The record proves just the opposite. Before the hearing Water Users told Co-op they would give evidence the springs would be adversely affected by mining the Tank seam "due to the hydrologic connection between the aquifer being dewatered in Co-op's mining operations and the aquifers from which Birch Spring and Big Bear Spring issue." [Fact 18] Before Water Users began their case the Board ruled they could present evidence on that point. [Fact 21] In their opening argument Water Users said they would give that evidence. [Fact 22] That is the very evidence Water Users presented. [Facts 23-25] Co-op's objections to that evidence were not sustained. [Fact 26] Water Users never claimed they had any evidence, or wished to present any evidence, beyond the evidence they presented. [Fact 36]

Water Users had every incentive to do all they could before the Board to prove their theory and disprove Co-op's. If Water Users had additional evidence or arguments, it was incumbent on them to develop the record, by presenting their evidence, by making an objection to errors in the Board's rulings [point II(A), *supra*], and if necessary by making offers of proof. In Mountain Fuel Supply Co. v. Public Serv. Com'n, 861 P.2d 414 (Utah 1993) this Court expounded on the rule:

Finally, the doctrine of exhaustion of administrative remedies may require Mt. Fuel to demonstrate the relevancy of the excluded evidence. In general, a party must exhaust its administrative remedies as a prerequisite to seeking judicial review. [Citations omitted] Underpinning this doctrine is the principle that before an error is considered on appeal, an agency should have the opportunity to correct it. [Citations omitted] If a party does not *attempt* to establish the relevancy of evidence it seeks to introduce but is allowed on review to challenge the agency's decision finding that evidence irrelevant, this principle is abridged. *Cf. Southland Corp v.*

Industrial Comm'n, 23 Utah 2d 94, 96-97, 458 P.2d 630, 632 (1960) (recognizing rule that petition for rehearing based on new evidence must be supported by proffer detailed enough to give agency opportunity to correct itself). This is particularly true when the agency's expertise would allow it to gauge the significance of the proffered evidence better than a reviewing court. [Emphasis in original.]

Id. at 423-24. See also *Hill*, *supra* at 1209 ("[T]o preserve this issue on appeal, appellant had to make an offer of proof on the record as to what evidence he intended to adduce"). If Water Users had any additional evidence, they could and should have offered it so the Board could rule on its admissibility. Water Users waived this issue by failing to make it part of the record.

VI. CO-OP SHOULD BE AWARDED ITS COSTS AND FEES.

Rule 33 of the Utah Rules of Appellate Procedure provides:

(a) ... [I]f the court determines that a motion or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party.

(b) For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify or reverse existing law.

In *O'Brien v. Rush*, 744 P.2d 306 (Utah App. 1987), the Court of Appeals awarded attorney fees under Rule 33(a) where a defendant's appeal had no legal or factual basis, but simply controverted the factual findings of the trial court:

This Court in *Eames v. Eames*, 735 P.2d 395, 398 (Utah App. 1987), awarded attorney fees in a situation in which the "totality of the defendant's argument" caused us to believe the appeal was frivolous. That alone meets the technical requirements of R.Utah Ct.App. 33(a) [now U.R.A.P. 33(a)]. However, we then went on to state that defendant's argument "fails to meet the standards of good faith and R.Utah Ct.App. 33(a) applies." *Id.* The last statement would tend to imply that R.Utah Ct.App. 33(a) requires this Court to find bad faith before attorney fees can be awarded. This is not so. ... Such a subjective standard is inappropriate for an appellate court.

... For purposes of Rule 33(a) of the Rules of the Utah Court of Appeals we define a "frivolous appeal" as one having no reasonable legal or factual basis as defined in Rule 40(a) [now U.R.A.P. 33(b) and 40(a)]. ...

It may be argued that the imposition of this definition creates a lesser standard than that created by Utah Code Ann. § 78-27-56 (1981) which requires lack of good faith. We do not disagree.

Id. at 309-10. Co-op should be awarded its costs and reasonable fees if (a) Water Users' arguments have no reasonable basis in fact and are therefore not well grounded in fact, or (b) Water Users' arguments have no reasonable basis in law and are therefore not warranted by existing law. Water Users' subjective good faith (or lack thereof) is irrelevant.

Water Users' entire jurisdictional argument intentionally and completely ignores the very statutes which define the scope and extent of the Board's jurisdiction. Utah Code Ann. sections 40-10-6, -10 and -11, and a straightforward application of those statutes to the uncontroverted facts of this case, plainly and conclusively establish the Board had jurisdiction to make its Order including all of its findings of fact and conclusions of law, and that there is no reasonable basis in either fact or law for Water Users' argument to the contrary.

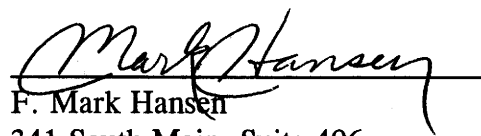
Similarly, all of Water Users' other arguments depend on a knowing concealment of the facts, and a misrepresentation of the very nature of the proceedings before the Board. [Points I through V, *supra*.] Water Users' factual arguments are completely negated by an examination of the whole record in the light of day. Their legal arguments are without any basis in the law. Their entire Petition, as in O'Brien, *supra*, reduces to an attempt to controvert the Board's factual findings. Water Users' Petition for Review is not grounded in fact, is not warranted by existing law, and is not based on a good faith argument to extend, modify or reverse existing law. It is "frivolous" under Rule 33(a). Therefore, Co-op requests an award against Water Users of its costs and attorney fees on appeal.

In the alternative, Co-op requests an award of its costs under Rule 34.

CONCLUSION

For the reasons stated above, this Court should affirm the Board's June 13, 1995 Order, including the Board's Findings of Fact and Conclusions of Law in their entirety, and award Co-op its costs and attorney fees on appeal.

Respectfully submitted this 22 day of April, 1996.


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CERTIFICATE OF SERVICE

I certify on the 22 day of April, 1996, I caused a true and correct copy of the BRIEF OF INTERVENOR to be served by hand-delivery to the following:

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